preference.[2] A lien, too, obtained by a third party was secure,[3] but a mere change in custody was of no effect.[4]

In this country there has developed a divergence of opinion among the state courts; some holding that the states, as successors to the sovereignty of the king, became invested with his right of priority;[5] and others repudiating the whole doctrine as inconsistent with our altered political conditions.[6] The courts which do adhere to the rule of state priority subject it to the English restriction that it is liable to be defeated *pro tanto*, by prior legal interests vested in third parties. Thus we find that the leading case on the subject in this country denies the state's claim to preference after an assignment in trust for creditors.[7] And, recently, it has further been held by the supreme court of Maryland that the state's preference did not survive against a receiver in whom the statute[8] vested title to the assets of an insolvent corporation. *State* v. *Williams*, 61 Atl. Rep. 297.

The result then of an action by the state claiming priority against a receiver, in any jurisdiction where the doctrine of state priority is accepted at all, must turn simply upon the question of receiver's title.

Under the old law, no title was vested in any receiver by the order appointing him,[9] for the order issued from a court of equity which had jurisdiction *in personam* only and was therefore incapable of dealing immediately with the title to a *res*. To-day, however, as in the principal case, receivers, and particularly corporation receivers, are by statute invested with title to the debtor's assets from the moment of appointment.[10] Certain text writers might well leave one with an impression that courts of equity now assume to pass title, at least to a debtor's personalty, into the receiver without the assistance of any statute.[11] It is true that some statutes have been held to pass title to personalty only,[12] and that some which do not refer expressly to either personalty or realty have been so broadly construed as to pass title to both by implication.[13] But it is believed that no case goes so far as to hold that a court of equity may, without legislative assistance, vest the receiver with title, save mediately by means of an assignment from the debtor. If, then, in a jurisdiction where the state's right to priority against the original debtor is recognized, the state attempts to obtain a preference against the receiver before an assignment, it must succeed in the absence of some affirmative enactment construed to pass title at the time of appointment.

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EXTINGUISHMENT OF RIPARIAN RIGHTS. — To prevent land from being encumbered, the courts generally have established differing rules for the revocation of parol licenses to do acts affecting land interests according

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[2] King *v.* Lee, 6 Price 369.
[3] King (in aid of Braddock) *v.* Watson, 3 Price 6.
[4] *In re* Henley & Co., 9 Ch. D. 469.
[5] Robinson *v.* Bank of Darien, 18 Ga. 65, 96.
[6] Freeholders of Middlesex Co. *v.* State Bank, 30 N. J. Eq. 311.
[7] State of Maryland *v.* Bank of Maryland, 6 Gill & J. (Md.) 205.
[8] Art. 23, § 382, Code of Public and General Laws of Maryland.
[9] Keeney *v.* Home Insurance Co, 71 N. Y. 396.
[10] *Cf. Re* Attorney-General *v.* Atlantic, etc., Co., 100 N. Y. 279.
[11] Alderson on Receivers 211, note 4; Beach on Receivers, 2d ed. 202, note 4; 23 Am. & Eng. Encyc. of Law 1046.
[12] Skinner *v.* Terhune, 45 N. J. Eq. 565.
[13] American National Bank *v.* National, etc., Co., 70 Fed. Rep. 420.

to the circumstances of the permission. If the parol license is to do an act on the licensor's land which will create an easement, it is revocable even though the licensee has acted to his detriment.[1] When, however, the permission is to do an act on the licensee's land which will extinguish an already existing easement, the license if acted upon becomes irrevocable.[2] The application of these rules to the disposition of water rights in a stream has been confused. An early English case,[3] the result of which has been apparently followed in England [4] and in some states in this country,[5] held that a parol license to an upper riparian owner to divert water could not be revoked when acted upon. This decision was based on the theory that a riparian owner's rights depended upon actual use of the stream. The court regarded the parol license acted upon as in effect an acknowledgment that the owner no longer intended to use the stream, and so an abandonment of the right. This conception of riparian rights has since been abandoned. It has become established that the riparian owner has a natural right to the flow of the water as an incident to his property independent of use.[6]

Another view by which Liggins *v.* Inge is explained is to regard this natural right as analogous to an easement, since it imposes a restraint on the upper owner's use of his land. Accordingly, a license to divert, though it causes a permanent damage to the licensor's land, is a license to extinguish an easement and hence irrevocable. Some of the text-writers apparently have taken this view.[7] The objection to it is that, even if the hypothesis be granted, the conclusion does not follow, for it should be against the policy of the law to allow such an easement to be extinguished by parol license when the result is also to abridge a natural right. This very objection points to another solution: to regard this derogation of a natural right not as the extinction but rather as analogous to the creation of an easement. When the riparian owner acquires the land, he receives a collection of natural rights, among them the right to take the water from the stream. Depriving him of the right is creating an interest against his land which might well be classed as an easement, though it is not within the technical definition.[8] Indeed, the definition is immaterial; whether it is called an easement or the extinction of a natural right incident to property, both expressions signify the same thing, — the creation of an interest in land. Such an interest should be subject to the same formalities necessary to transfer any estate in land.[9] Thus the California Supreme Court has recently considered the transfer by parol license of a similar [10] right to waters in a stream to be within the Statute of Frauds. *Churchill* v. *Russell*, 82 Pac. Rep. 440.

A parol license, then, to divert water from a stream should be revocable, like any other parol license to create an easement. When, however, as in

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1 Fentiman *v.* Smith, 4 East 107. Lee *v.* McLeod, 12 Nev. 280, *contra.*
2 Morse *v.* Copeland, 2 Gray (Mass.) 302.
3 Liggins *v.* Inge, 7 Bing. 682.
4 See Davies *v.* Marshall, 10 C. B. (N. S.) 711.
5 Addison *v.* Hack, 2 Gill (Md.) 221.
6 Embrey *v.* Owen, 6 Exch. 369. See Goddard, Easements, 6th ed., 83.
7 See Gould, Waters, 1st ed., § 322; Angell, Watercourses, 7th ed., § 316.
8 See Gale, Easements, 1st ed., 2.
9 See Doyle *v.* San Diego Land and Town Co., 46 Fed. Rep. 709; Veghte *v.* Raritan Water Power Co., 19 N. J. Eq. 142 (reversed in 21 N. J. Eq. 463 on another ground). See also Farnham, Law of Waters, 1st ed., 2345.
10 See Pomeroy, Riparian Rights, 1st ed., § 15, for law peculiar to California and other western states.

this California case, there is an agreement founded upon a valid consideration, and partly performed so as to alter materially the position of the party performing, the case may be brought within the established equitable doctrine allowing specific performance of parol contracts.[11]

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JURISDICTION IN AN ACTION FOR INFRINGEMENT OF FOREIGN PATENT. — In the United States the courts will entertain suits for foreign torts, whether common law or statutory, unless the cause of action is repugnant to the public policy or morals[1] of the home state; and the question of whether the *lex fori* would give a remedy for the same cause arising within the state, is considered only as evidence of whether morals or policy would be offended against by such action.[2] The English rule as laid down in the case of The Halley,[3] which must now be taken as settled law, is less liberal than the American, and denies that the courts have jurisdiction to entertain any suit for a tort committed abroad, unless the act would have been tortious by the principles of the English law. A late case in Victoria has denied the right to sue there for the infringement of a patent in New South Wales, one of the justices taking the ground that the combination of chemicals complained of, if it had been made in Victoria, would not have infringed any patent there existing. *Potter* v. *Broken Hill Proprietary Co.* (1905), Vict. L. Rep. 612.

We believe that the justice erred in his interpretation of the rule which he was applying, when he insisted that the criterion was whether the physical actions of the defendant would have been actionable if stripped of their context of local rights and obligations and transferred to the home state. The rational basis of the English rule is the feeling that the courts should not be required to hear suits for foreign causes of action which would have been deemed trivial or impolitic if they had arisen at home. But the infringement of a patent right would have been a tort if it had occurred in Victoria. And to argue that the physical acts of the defendant would not have been an actionable infringement of patent in Victoria because there was no patent there to infringe is as irrelevant as to argue that the blow of a defendant sued in England for an assault in France would not have been a tort in England because the person of the plaintiff would have been safe across the channel. This particular infringement could not have occurred in Victoria, but the essential fact is that if an infringement had occurred there, redress would have been given under Victorian law.

The broader interpretation suggested above, as opposed to the construction of the Victoria judge, makes the English rule more nearly consistent with that applied in similar cases in America, and with the general common law rule as to foreign contracts, which allows recovery unless the agreement sued on was against the morals or policy of the home state;[4] and there is no consideration of principle or expediency offsetting the failure of justice which arises from allowing a tortfeasor to escape restitution by moving

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[11] Devonshire *v.* Eglin, 14 Beav. 530.

[1] Herrick *v.* Minneapolis, etc., Ry. Co., 31 Minn. 11; Dennick *v.* Railroad Co., 103 U. S. 11.

[2] *Cf.* Leman *v.* Baltimore, etc., R. R Co., 128 Fed. Rep. 191.

[3] The Halley, L. R. 2 P. C. 193; *cf.* Phillips *v.* Eyre, L. R. 6 Q. B. 1–28.

[4] Columbia, etc., Ass'n *v.* Rice, 68 S. C. 236.